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IN THE COURT OF APPEALS
THIRD COURT OF APPEALS DISTRICT
AUSTIN, TEXAS

***

MADELEINE CONNOR
Appellant

V.

DOUGLAS HOOKS,
Appellee

APPEAL FROM THE 201st DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
TRIAL COURT CAUSE NO. D-1-GN-18-005130
HONORABLE CATHERINE MAUZY, PRESIDING JUDGE

AMICUS BRIEF OF SCOTT M. TSCHIRHART ON "GOOD CAUSE" UNDER TEXAS RULE OF APPELLATE PROCEDURE 11

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AMICUS CURIAE

IDENTITY OF PARTIES AND COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

REFERENCE TO THE RECORD

Clerk's Record will be referenced as: CR [Page #]

Reporter's Record will be referenced as: RR [Page #], LN [Line #]

INTEREST OF AMICUS CURIAE

The Amicus has defended a parallel series of cases brought by Appellant which started in the Travis County District Court on or about September 2, 2015. Appellant initially brought suit against the individual Board Members of the Lost Creek Municipal Utility District located in Travis County, Texas. The suit was originally a Rule 202 petition to obtain evidence regarding alleged misconduct relating to the installation of sidewalks in the District after a pedestrian was struck in traffic.

The initial suit morphed into federal civil rights claims and state tort claims for intentional infliction of emotional distress and defamation per se against the Lost Creek MUD Board Members, and separate (but related) lawsuits against members of the Lost Creek Neighborhood Association and residents who participated in an action to remove Appellant from her position as President of the Lost Creek Neighborhood Association. Appellant alleged the same claims for intentional infliction of emotional distress and defamation per se in the separate related lawsuits and in some cases named one of the Lost Creek MUD Board Members (Charles McCormick) as a Defendant in the Lost Creek Neighborhood litigation, alleging identical claims on the same subject matter against that Board Member that had been previously dismissed in the Lost Creek MUD litigation. Those allegations of

intentional infliction of emotional distress and defamation per se claims were in response to internet postings and emails.

The underlying suit in the present case was a Rule 202 petition to seek discovery against the Hicks (who Appellant had previously sued in the Lost Creek Neighborhood Association lawsuits) alleging intentional infliction of emotional distress and defamation per se relating to an alleged internet posting.

Appellant engaged in a pattern of vexatious litigation against those who she opposed politically in her neighborhood to harass and intimidate them for more than four years.

Amicus personally appeared in the following matters and Appellant appeared as a pro se litigant in each of them:

In Travis County District Court:

1. Cause No. D-1-GN-15-003714; *In re David McIntyre*, in the 419th Judicial District Court in Travis County as lead Defense Counsel. (This matter, including the intentional infliction of emotional distress and defamation per se claims, was dismissed pursuant to the Texas Citizen Participation Act on June 23, 2017. Fees and sanctions in the amount of $27,700.67 awarded to Defendants.).

2. Cause No. D-1-GN-16-005883; *Madeleine Connor v. Marc Stephenson, et al.*, in the 200th Judicial District in Travis County as Amicus Curiae. (This matter included claims that had been previously dismissed in lawsuit No. 1 for intentional infliction of emotional distress and defamation per se for the exact same email. Those claims were dismissed on November 28, 2018 on the grounds of *res judicata*.).

3. Cause No. D-1-GN-18-005130; *In re Madeleine Connor*, in the 201st Judicial District in Travis County as Amicus Curiae. (This is the case that is currently before this Honorable Court on appeal.)

Federal District Court:

4. Cause No. 1:15-CV-001100-RP; *David McIntyre, and Madeleine Connor v. Eric Castro, Nancy Naeve, Gary Sertich, Leah Stewart and Chuck McCormick* in the Western District of Texas – Austin Division as lead Defense Counsel. (The federal claims in this matter were dismissed on April 8, 2016 and the state law claims were remanded to the Travis County District Court.). *See McIntyre v. Castro*, No. 1-15-CV-1100 RP, 2016 WL 1714919, at *5 (W.D. Tex. Apr. 8, 2016), *aff'd*, 670 F. App'x 250 (5th Cir. 2016).

5. Cause No. 1:16-CV-490 RP; *David McIntyre and Madeleine Connor v. Eric Castro, Nancy Naeve, Gary Sertich, Leah Stewart and Chuck McCormick*, in the Western District of Texas –Austin Division as lead Defense Counsel. (The federal claims in this matter were dismissed on April 25, 2017 and the state law claims were remanded to the Travis County District Court.) *See McIntyre v. Castro*, No. 1:16-CV-490 RP, 2017 WL 1483572, at *6 (W.D. Tex. Apr. 25, 2017), *aff'd in part sub nom. Connor v. Castro*, 719 F. App'x 376 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 343, 202 L. Ed. 2d 225 (2018).

6. Cause No. 1:17-CV-00827 RP; *Madeleine Connor v. Leah Stewart, Eric Castro and Chuck McCormick*, in the Western District of Texas – Austin Division, as lead Defense Counsel. (The federal claims were dismissed, and a Rule 11 Motion for Sanctions was granted. Connor was explicitly declared a vexatious litigant.) *See Connor v. Stewart*, No. 1:17-CV-827-RP, 2018 WL 2994644, at *6 (W.D. Tex. June 14, 2018), aff'd, 770 F. App'x 244 (5th Cir. 2019).

In Texas State Courts of Appeals:

7. Cause No. 03-15-00707-CV; *In re David McIntyre*, Original Proceeding from Travis County, as lead Defense Counsel. (This was an original proceeding seeking a mandamus to force the Honorable Judge Gus Strauss to grant a Temporary Restraining Order that was rejected three times by Travis County District Courts. The Court of Appeals denied the Petition

on November 13, 2015). *See In re McIntyre*, No. 03-15-00707-CV, 2015 WL 7164111, at *1 (Tex. App. Nov. 13, 2015).

8. Cause No. 13-17-00565-CV; *David McIntyre and Madeleine Connor v. Eric Castro, et al.*, in the Thirteenth Court of Appeals, in Corpus Christi, Texas (transferred from the Third Court of Appeals, formerly Cause No. 03-17-00625) as Lead Counsel. (The Court of Appeals affirmed the trial court's dismissal [of No. 1] pursuant to Chapter 27 and affirmed the award of attorneys' fees and sanctions.) *See McIntyre v. Castro*, No. 13-17-00565-CV, 2018 WL 6175858, at *9 (Tex. App. Sept. 6, 2018), *review denied* (Jan. 11, 2019), *reh'g denied* (Mar. 8, 2019).

9. Cause No. 03-18-00813-CV; *Madeleine Connor v. Charles "Chuck" McCormick*, in the Third Court of Appeals, as Amicus Curiae. (under submission at the time of this brief).

10. Cause No. 03-19-00198-CV; *Madeline Connor v. Douglas Hooks*, in the Third Court of Appeals, in Austin, Texas, as Amicus Curiae. (This is the present case.).

In the Fifth Circuit Court of Appeals:

11. Cause No. 16-50371; *David McIntyre; Madeleine Connor v. Eric Castro, Nancy Naeve, Gary Sertich, Leah Stewart and Chuck McCormick*; in the United States Court of Appeals for the Fifth Circuit, as Lead Counsel; (affirming the dismissal of Connor's First Amendment retaliation claim and remand of the state law claims.) *See McIntyre v. Castro*, 670 F. App'x 250, 251 (5th Cir. 2016).

12. Cause No. 17-50452; *Madeleine B. Connor v. Eric Castro, Nancy Naeve, Gary Sertich, Leah Stewart, and Charles "Chuck" McCormick*; in the United States Court of Appeals for the Fifth Circuit, as Lead Counsel; (affirming the dismissal of Connor's claims and the denial of her motion for leave to file a supplemental complaint.) *See Connor v. Castro*, 719 F. App'x 376, 380 (5th Cir.), cert. denied, 139 S. Ct. 343, 202 L. Ed. 2d 225 (2018).

13. Cause No. 18-50815; *Madeleine Connor v. Leah Stewart, et al*., in the United States Court of Appeals for the Fifth Circuit, as lead counsel;(affirming dismissal and finding that Connor was a vexatious

litigant.) *See Connor v. Stewart*, 770 F. App'x 244 (5th Cir. 2019)(Motion for Sanctions and Attorneys' Fees granted and petition for rehearing denied)(June 21, 2019).

In the United States Supreme Court:

14. No. 18-249; *Madeleine Connor v. Eric Castro, et al*., as Lead Counsel (petition for writ of certiorari denied). *See, Connor v. Castro*, 139 S. Ct. 343, 202 L. Ed. 2d 225 (2018).

15. No. 18A1038; *Madeleine Connor v. Eric Castro, et al*., as Lead Counsel (petition for writ of certiorari from the Texas Supreme Court, Connor missed her briefing deadline and the extended deadline May 27, 2019).

I am also personally familiar with the following cases in which Appellant has appeared pro se:

16. *Connor v. Stephenson*, No. 03-18-00750-CV, 2018 WL 6816829, at *2 (Tex. App.—Austin, Dec. 28, 2018), review denied (Apr. 26, 2019)(Connor's appeal dismissed for want of jurisdiction.).

17. *Connor v. Connor*, No. 01-17-00268-CV, 2018 WL 3542911, at *1 (Tex. App.—Houston [1st Dist.] 2018), review denied (Jan. 11, 2019)(motion to dismiss appeal filed by Madeline Connor granted; mandamus denied Dec. 7, 2018; review denied Jan 11, 2019; rehearing for petition for review denied Mar. 1, 2019).

18. *In re Connor*, No. 03-18-00772-CV, 2018 WL 6565054, at *1 (Tex. App.—Austin, Dec. 13, 2018)(Petition for writ of mandamus denied).

19. *Connor v. Lost Creek Neighborhood Ass'n*, No. 03-19-00347-CV, 2019 WL 3210607, at *1 (Tex. App.--Austin July 17, 2019)(appeal temporarily stayed due to Connor's designation as a vexatious litigant).

20. *Connor v. Hill Country Animal Hosp.*, No. 03-19-00090-CV, 2019 WL 5251142, at *3 (Tex. App.—Austin, Oct. 17, 2019)(affirming summary judgment against Connor).

Amicus seeks only to preserve the finality of trial court's finding that Appellant is a vexatious litigant and to avoid the miscarriage of justice that would result should this Honorable Court issue a contradictory ruling from the decisions of the courts noted in the previously filed amicus brief.

Amicus is receiving no payment of any kind from any source in connection with this brief and does not anticipate receiving any payment.

STATEMENT OF THE CASE

The only issue to be addressed in this Brief is whether the trial court properly declared Appellant a vexatious litigant.

STATEMENT REGARDING ORAL ARGUMENTS

Based on the issues presented in this appeal, and the clarity of the record, oral argument would be a waste of judicial resources and would not assist the Court in resolving any issues. However, should the Court desire oral argument, Amicus would gladly oblige.

STATEMENT OF THE ISSUES PRESENTED

Amicus will address each of the issues presented by Appellant in the order in which they are presented in *Appellant's Brief*.

TO THE HONORABLE THIRD COURT OF APPEALS:

NOW COMES Amicus Curiae, SCOTT M. TSCHIRHART, ("Amicus") and submits this Amicus Curiae Brief in accordance with the Texas Rules of Appellate Procedure ("TRAP").

STATEMENT OF FACTS

The statement of facts underlying this case have been set forth in detail in the District Court's findings of fact. [RR at 310-314]. For the sake of brevity, Amicus will not repeat them here.

SUMMARY OF THE ARGUMENT

The District Court correctly determined that Appellant is a vexatious litigant and this Honorable Court should affirm that decision.

ARGUMENTS AND AUTHORITIES

ISSUE ONE: The trial court did not abuse its discretion to declare Appellant a vexatious litigant.

Appellant contends that the trial court's *Order Determining Plaintiff a Vexatious Litigant* [CR 266-268; CR 306-308] and *Findings of Fact and Conclusions of Law* [CR 280-286; CR 309-315] are not supported by sufficient evidence in the record. However, there is more than sufficient evidence in the record to support the trial court's findings.

Tex. Civ. Prac. & Rem. Code § 11.054(3).

Appellant first argues that there is insufficient evidence to support a vexatious litigant finding under Tex. Civ. Prac. & Rem. Code § 11.054(3). Section 11.054(3) states:

> A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:
> . . . .
> (3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

Tex. Civ. Prac. & Rem. Code § 11.054. This Court has set the applicable standard for reviewing the trial court's determination:

> [B]ecause a trial court may exercise its discretion to declare a party a vexatious litigant only if it first makes prescribed statutory evidentiary findings, we also review the trial court's subsidiary findings under chapter 11 for legal and factual sufficiency. . . . In reviewing a legal sufficiency challenge, the no-evidence challenge fails if there is more than a scintilla of evidence to support the finding. *See BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 795 (Tex. 2002); *Tempest Broadcasting Corp. v. Imlay*, 150 S.W.3d 861, 868 (Tex. App.-Houston [14th Dist.] 2004, no pet.). In reviewing a factual sufficiency challenge, we set aside the trial court's decision only if its ruling is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Imlay,* 150 S.W.3d at 868.

Leonard v. Abbott, 171 S.W.3d 451, 459 (Tex. App.--Austin 2005, pet. denied).

Appellant had no reasonable probability of prevailing because Appellant brought suit outside of the limitations period. Appellant filed her 202 Petition on

September 14, 2018. [CR 4]. Appellant purported to investigate an allegedly defamatory Internet posting dated June 1, 2017. [CR 5]. The hearing on the Motion that underlies this appeal took place on January 3, 2019. [RR 1]. Under Texas law, a defamation per se claim for publishing allegedly defamatory statements on the Internet is subject to a one-year limitations period. *See Tex. Civ. Prac. & Rem. Code* § 16.002(a); *Velocity Databank, Inc. v. Shell Offshore, Inc.*, 456 S.W.3d 605, 609 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). At the time of Appellant's initial filing of the 202 Petition, limitations had already run on her potential claim. Therefore, Appellant had no reasonable probability of prevailing. *See Glassdoor, Inc. v. Andra Grp., LP*, 575 S.W.3d 523, 530 (Tex. 2019), *reh'g denied* (June 21, 2019) (finding that a 202 Petition is moot if limitations has passed before a plaintiff files a regular suit).

Even if Appellant had brought the 202 Petition within the limitations period, on January 24, 2019, Appellant filed a *Notice of Non-Suit With Prejudice*. [CR 119]. The filing of this Notice of Nonsuit ensured that there was no reasonable probability of prevailing in this litigation. Therefore, on March 9, 2019, when the District Court signed the *Order Determining Plaintiff a Vexatious Litigant* [CR 266-268] the District Court correctly found that "there [was] not a reasonable probability that the plaintiff [would] prevail in the litigation against the defendant." Tex. Civ. Prac. & Rem. Code § 11.054.

The remaining issue is whether the Court correctly found that Appellant had been declared to be vexatious by a state or federal court. The trial court's *Order Determining Plaintiff a Vexatious Litigant* [CR 266-268] specifically states:

> The Court further finds that Madeleine Connor was declared a vexatious litigant by United States District Judge Robert Pitman on August 30, 2018 in Cause NO. 1:17-CV-827-RP, filed in the United States District Court For the Western District of Texas, Austin Division, styled Madeleine Connor, Plaintiff v. Leah Stewart, Eric Castro, and Chuck McCormick.

[CR 307]. The Order further noted that Appellant was appealing Judge Pitman's ruling. [CR 307].

The *Findings of Fact and Conclusions of Law* [CR 309-315] specifically quote Judge Pitman's opinion. [CR 313]. The District Court went on to state:

> Judge Pittman's imposition of a pre-filing injunction against Petitioner satisfies Section 11.054(3) of the Texas Civil Practice and Remedies Code for finding Plaintiff a vexatious litigant. The Court finds that Petitioner was declared a vexatious litigant by a federal court. The Court finds that a federal Court determined Petitioner a vexatious litigant.
>
> The actions enumerated in Paragraph 18 above were filed by Petitioner in federal court and state court and are based on the same or substantially similar facts, transition, or occurrence as exist in the instant case.

[CR 314]. The District Court made the "prescribed statutory evidentiary findings" required under the statute. *Leonard*, 171 S.W.3d at 459.

The record indicates that the present case is based on the same or substantially similar facts, specifically an internet posting that Appellant contends was

defamatory. [CR 5-6; CR 24; CR 35-36; CR 44; CR 55-56; CR 63-66; CR 108; CR 176; CR 179]. Moreover, the testimony elicited by Appellant shows that there is a definite connection between the cases. [RR 43].

Judge Pitman's Order demonstrates that Appellant has been explicitly found to be a vexatious litigant and entered a pre-suit injunction against Appellant. [CR 23-29]. Appellant elicited testimony at the hearing concerning Judge Pitman's Order declaring Appellant a vexatious litigant. [RR 35-36].

There can be no doubt but that the record contains "more than a scintilla of evidence to support the finding" that Appellant had been found to be a vexatious litigant by United States District Judge Pitman. *Leonard*, 171 S.W.3d at 459. Under these circumstances, where the District Court's finding is not "so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust" the Court must affirm the District Court's finding that Appellant is a vexatious litigant. *Id*.

It should be noted that the District Court also had before it the *Amicus Curiae of Scott M. Tschirhart* (the "Amicus Brief"). Appellant specifically chose not to include in the appellate record. [CR 330]. However, Appellant argued about the Amicus Brief at the hearing. [RR 33]. Appellant elicited testimony from Amicus about the Amicus Brief at the hearing. [RR 37-39; RR 41-47]. The District Court indicated that it could read the Amicus Brief and consider it. [RR 39]. Appellant

later briefed the District Court regarding the Amicus Brief in connection to Appellant's efforts not to be declared a vexatious litigant. [CR 257-260].

Amicus also filed an *Amicus Curiae of Scott M. Tschirhart in Response to Connor's Request For Findings of Fact and Conclusions of Law*. [CR 340]. Though clearly relevant to this appeal, Appellant chose to omit this Amicus Brief from the record as well. [CR 340].

Because Appellant intentionally chose to omit the Amicus Briefs from the appellate record, this Court should presume that the omitted Amicus Briefs and all attachments support the District Court's findings. *See Enter. Leasing Co. of Houston v. Barrios*, 156 S.W.3d 547, 550 (Tex. 2004)(Finding that when evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment.). The Court should find that the record contains more than enough evidence to support a finding that Appellant is a vexatious litigant under Tex. Civ. Prac. & Rem. Code §11.054(3). The Court should affirm the District Court's *Order Determining Plaintiff a Vexatious Litigant*. [CR 266-268].

Tex. Civ. Prac. & Rem. Code § 11.054(1).

Appellant next contends that the District Court erred in that the record does not support a finding that Appellant is a vexatious litigant under Tex. Civ. Prac. & Rem. Code §11.054(1). Section 11.054(1) states:

> A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:
>
> (1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been:
>
> (A) finally determined adversely to the plaintiff;
> (B) permitted to remain pending at least two years without having been brought to trial or hearing; or
> (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;

Tex. Civ. Prac. & Rem. Code § 11.054.

As previously shown, Defendant/Appellee showed that there was no reasonable probability that Appellant would prevail because Appellant failed to bring her lawsuit within limitations, and then nonsuited her lawsuit with prejudice against refiling. The Court wrote:

> The Court finds that in the seven year-period immediately preceding the date Respondent Douglas Hooks filed his motion under Section 11.051 of the Texas Civil Practice and Remedies Code, Petitioner Madeleine Connor had commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in small claims court that have been finally determined adversely to Madeleine Connor as Required by Section 11.054(1) of the Texas Civil Practice and Remedies Code.

[CR 267]. The District Court listed eighteen [18] litigations that Appellant had commenced, prosecuted, or maintained as a pro se litigant. [CR 283-284]. The

District Court found that at least five [5] of these cases had ultimately been determined adversely to Appellant. [CR 285].

Appellant failed to timely object to these findings of fact or request different or additional findings of fact as required by Texas Rule of Appellate Procedure 298. Therefore, Appellant waived her right to complain about these findings on appeal. *See Buckeye Ret. Co., LLC v. Bank of Am., N.A.,* 239 S.W.3d 394, 405–06 (Tex. App.—Dallas 2007)(Bank waived attorneys' fees available under the rules because it failed to request additional or different findings of fact.); *Cotten v. Weatherford Bancshares, Inc.,* 187 S.W.3d 687, 708 (Tex. App.--Fort Worth 2006, pet. denied) (party waived mitigation defense after failing to request additional findings of fact and conclusions of law); *Smith v. Smith*, 22 S.W.3d 140, 149 (Tex. App.--Houston [14th Dist.] 2000, no pet.) (party waived his right to complain on appeal about any error he assumed the court made by failing to request additional findings of fact and conclusions of law).

Appellant elicited testimony regarding the number of cases that had been adversely decided against her. [RR 44-45].

The previously mentioned Amicus Briefs also contained information about the dispositions of the various cases that Amicus previously appeared in as lead counsel or as an amicus. The Court should presume that the omitted Amicus Briefs

and all attachments support the District Court's findings. *See Barrios*, 156 S.W.3d at 550.

The Court should find that the record contains more than enough evidence to support a finding that Appellant is a vexatious litigant under Tex. Civ. Prac. & Rem. Code § 11.054(1). The Court should affirm the District Court's *Order Determining Plaintiff a Vexatious Litigant*. [CR 266-268].

Tex. Civ. P. & Rem. Code § 11.054(2).

Appellant contends that the record does not support a finding that she violated Section 11.054(2) which reads:

> A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:
> . . . .
> (2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se, either:
>
> > (A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or
> > (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined

Tex. Civ. Prac. & Rem. Code § 11.054.

Again, as stated above, Appellee/Defendant showed that Appellant had no reasonable probability that she would prevail in the litigation as it was filed outside

of limitations and before the District Court ruled, Appellee nonsuited her claims with prejudice against refiling.

The District Court expressly found that after a litigation had been finally determined against Appellant, she continued to prosecute the same claims against the same defendant. [CR 285].

The record shows that Appellee violated Section 11.054(A) by continuing to sue the same defendants over matters that had been finally decided. [CR 23-29; CR 60]. There was a discussion at the hearing about Appellee re-litigating claims against the Hooks. [RR 21-23].[1]

The Amicus Briefs also contain information about Appellant's re-litigation of claims against defendants that Amicus represented. The Court should presume that the omitted Amicus Briefs and all attachments support the District Court's findings. *See Barrios*, 156 S.W.3d at 550.

The Court should find that the record contains more than enough evidence to support a finding that Appellant is a vexatious litigant under Tex. Civ. P. & Rem. Code §11.054(1). The Court should affirm the District Court's *Order Determining Plaintiff a Vexatious Litigant*. [CR 266-268].

ISSUE TWO: Appellant waived her right to complain on appeal by failing to timely request additional or different findings of fact or conclusions of law.

[1] For litigation specifically against Douglass Hooks *see* [CR 108; CR 119; CR 128-133; CR 139-145; CR 299-305]

Appellant now contends that the trial court should be reversed for failing to issue a finding that the "defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant." Tex. Civ. Prac. & Rem. Code § 11.054.

Appellant errs in placing the burden for requesting findings of fact and conclusions of law. The party seeking to overturn the decision below has the burden of obtaining such findings and conclusions:

> When a party appeals from a nonjury trial, it must complain of specific findings and conclusions of the trial court, because a general complaint against the trial court's judgment does not present a justiciable question. *Fiduciary Mortgage Co. v. City Nat'l Bank*, 762 S.W.2d 196, 204 (Tex. App.-Dallas 1988, writ denied). Accordingly, findings of fact and conclusions of law are mandatory for a party to file to avoid the onerous presumptions that apply in an appeal from a nonjury trial. **When an Appellant does not request or file findings and conclusions by the trial court, the appellate court presumes the trial court found all fact questions in support of its judgment, and the reviewing court must affirm that judgment on any legal theory finding support in the pleadings and evidence.** *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987).

Dominguez v. Castaneda, 163 S.W.3d 318, 326 (Tex. App.—El Paso 2005, pet. denied)(emphasis added).

Here Appellant requested findings of fact and conclusions of law, but Appellant failed to timely object to the District Court's findings and conclusions or request different or additional findings of fact and conclusions of law as required by Texas Rule of Appellate Procedure 298. Therefore, Appellant waived her right to

complain about these findings on appeal. *See Buckeye Ret. Co., LLC v. Bank of Am., N.A.,* 239 S.W.3d 394, 405–06 (Tex. App.—Dallas 2007)(Bank waived attorneys' fees available under the rules because it failed to request additional or different findings of fact.); *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 708 (Tex. App.-Fort Worth 2006, pet. denied) (party waived mitigation defense after failing to request additional findings of fact and conclusions of law); *Smith v. Smith*, 22 S.W.3d 140, 149 (Tex. App.-Houston [14th Dist.] 2000, no pet.) (party waived his right to complain on appeal about any error he assumed the court made by failing to request additional findings of fact and conclusions of law).

Since Appellant waived her right to complain about the District Court's Findings of Fact and Conclusions of Law, the Court should affirm the District Court's *Order Determining Plaintiff a Vexatious Litigant*. [CR 266-268].

ISSUE THREE: The District Court had jurisdiction to declare Appellant a vexatious litigant despite her notice of nonsuit.

Appellant argues that the District Court was without jurisdiction to declare her a vexatious litigant after she filed her notice of nonsuit. However, Texas law is clear that a nonsuit does not extinguish a defendant's affirmative claims for relief or sanctions. Rule 162 states in relevant part:

> Any dismissal pursuant to this rule **shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief** or excuse the payment of all costs taxed by the clerk. A dismissal under this rule **shall have no effect on any motion for sanctions**, attorney's

> fees or other costs, pending at the time of dismissal, as determined by the court.

Tex. R. Civ. P. 162. "A claim for affirmative relief is one on which the claimant could recover compensation or relief even if the plaintiff abandons his cause of action." *Texas Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 38 (Tex. 2008).

> Any dismissal pursuant to Rule 162 "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief[.]" Tex. R. Civ. P. 162. A dismissal under Rule 162 also has "no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court." *Id.* **Therefore, Crittendon's notice of non-suit had no effect on the trial court's authority to consider and rule on Raschke's motion to declare Crittendon a vexatious litigant, which Raschke filed before Crittendon attempted to non-suit his claims against Raschke.** *See Garrett v. Macha*, No. 2–09–443–CV, 2010 WL 3432826, at *5 (Tex. App.–Fort Worth Aug. 31, 2010, no pet.) (mem. op.). Furthermore, the filing of a motion to declare the plaintiff a vexatious litigant stays all other proceedings in the trial court until after the trial court rules on the motion, and the trial court is required to determine the motion. *See Tex. Civ. Prac. & Rem. Code Ann. §§ 11.052–.053.* Therefore, the trial court did not abuse its discretion by considering and ruling on Raschke's motion to declare Crittendon a vexatious litigant. *See, e.g., Drake v. Willing,* No. 03–14–00665–CV, 2015 WL 5515903 at *4 (Tex. App.–Austin Sept. 16, 2015, no pet.) (holding that "[e]ven challenges to the court's subject-matter jurisdiction over a plaintiff's claims may be left unresolved pending the vexatious-litigant determination").

Crittendon v. Doe, No. 09-16-00375-CV, 2017 WL 5179790, at *2 (Tex. App.--Beaumont Nov. 9, 2017, no writ.); *Garrett v. Macha*, No. 2-09-443-CV, 2010 WL 3432826, at *5 (Tex. App.—Fort Worth Aug. 31, 2010, no pet.)(Nonsuit does not defeat vexatious litigant motion.).

Appellant's nonsuit and filing of a separate action had no effect on Appellee's motion to declare Appellant a vexatious litigant. The Court should affirm the District Court's *Order Determining Plaintiff a Vexatious Litigant*. [CR 266-268].

ISSUE FOUR: The vexatious litigant statute applies to Rule 202 petitions.

Appellant argues, without authority, that the Texas vexatious litigant statute does not apply to Rule 202 petitions. Appellant failed to preserve this argument as the record shows that this argument was not presented to the District Court. *See Tex. R. App. P.* 33.1(a)(1) (providing that to preserve a complaint for appellate review, the complaining party must present the complaint to the trial court by timely request, objection, or motion); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 222 (Tex. 2002) (holding party failed to raise constitutional argument that trial court's ruling violated open-courts provision and thus did not preserve it for appeal); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (holding party waived due-process and equal-protection challenges by failing to raise them in trial court); *Birdo v. Ament*, 814 S.W.2d 808, 811 (Tex. App.-Waco 1991, writ denied) (holding pro se appellant waived constitutional complaints to dismissal of his lawsuit by not raising the constitutional challenges in the trial court).

Since Appellant failed to preserve this argument by failing to raise it in the District Court, the Court should affirm the *District Court's Order Determining Plaintiff a Vexatious Litigant*. [CR 266-268].

ISSUE FIVE: The vexatious litigant statute is constitutional on its face and as applied.

Appellant argues that the vexatious litigant statute is unconstitutional on its face because it is an unconstitutional prior restraint. This argument has been exhaustively considered and rejected by Texas and federal courts applying Texas law.

> [T]hese restrictions are not unreasonable or arbitrary when balanced against the purpose and basis of the statute. The purpose of chapter eleven is to restrict frivolous and vexatious litigation. *See Devoll v. State*, 155 S.W.3d 498, 501 (Tex. App.-San Antonio 2004, no pet.) (statute "provides a framework for courts and attorneys to curb vexatious litigation"). It does not authorize courts to act arbitrarily, but permits them to restrict a plaintiff's access to the courts only after first making specific findings that the plaintiff is a vexatious litigant based on factors that are closely tied to the likelihood that the incident litigation is frivolous. *See Tex. Civ. Prac. & Rem. Code Ann*. § 11.054; *Liptak*, 2002 U.S. Dist. LEXIS 940, at *12–13. Although Leonard was found to be a vexatious litigant, chapter 11 and the trial court's order did not categorically bar him from prosecuting his lawsuit, but merely required him to post security to cover appellees' anticipated expenses to defend what the circumstances would reasonably suggest is a frivolous lawsuit. *See Tex. Civ. Prac. & Rem. Code Ann.* § 11.055.4 Additionally, the prefiling order does not preclude Leonard from filing new lawsuits; he is merely required to obtain permission from the local administrative judge before filing. *See id.* §§ 11.101, .102. The restrictions are not unreasonable when balanced with the significant costs of defending Leonard's likely frivolous lawsuits in the future.

Leonard v. Abbott, 171 S.W.3d 451, 457–58 (Tex. App.--Austin 2005, pet denied); *see also In re Potts*, 357 S.W.3d 766, 769 (Tex. App.—Houston [14th Dist] 2011, no pet.)(vexatious litigant statute does not violate the vexatious litigant's

constitutional due process rights.); *Retzlaff v. Goamerica Commc'ns Corp*., 356 S.W.3d 689, 703–04 (Tex. App.—El Paso 2011, no pet.); *Johnson v. Sloan*, 320 S.W.3d 388, 389–90 (Tex. App.-El Paso 2010, pet. denied); *Clifton v. Walters*, 308 S.W.3d 94, 101–02 (Tex. App.-Fort Worth 2010, pet. denied); *In re Johnson*, No. 07–07–0245–CV, 2008 WL 2681314, at *2 (Tex. App.-Amarillo Jul. 9, 2008, orig. proceeding) (mem. op.); *Caldwell v. Zimmerman*, No. 03-18-00168-CV, 2019 WL 1372027, at *2 (Tex. App.—Austin Mar. 27, 2019)(Vexatious litigant statute does not violate rights to due process, equal protection of the law, and to petition the courts for relief.); *Liptak v. Banner*, No. CIV.A. 301CV0953M, 2002 WL 378454, at *4, *5 (N.D. Tex. Mar. 7, 2002)(Vexatious litigant statute does not violate First, Seventh or Fourteenth Amendment rights.). Federal Courts use pre-suit injunctions to attempt to curb abuse of the legal system and such injunctions are not unconstitutional. Appellant is currently subject to a pre-suit injunction in the Western District of Texas. [CR 23-29]. Appellant argued these same Constitutional issues against Judge Pitman's imposition of the pre-suit injunction and her arguments were rejected by the Fifth Circuit. *See Connor v. Stewart*, 770 F. App'x 244 (5th Cir. 2019).

> "The Fifth Circuit has held that requiring a plaintiff to receive the permission of the Court before filing a lawsuit is appropriate where plaintiffs are 'abusing the judicial process by such filings and [are] delaying the consideration of meritorious claims.' *" Id.* (*quoting Liptak v. Banner,* No. CIV.A. 301CV0953M, 2002 WL 378454, at *6 (N.D. Tex. Mar. 7, 2002) (quoting *Murphy v. J.A. Collins*, 26 F.3d 541, 544

(5th Cir. 1994); *Balawajder v. Scott*, 160 F.3d 1066, 1067 (5th Cir. 1999)).

Thomas v. Culpepper, No. 4:18-CV-814-ALM-CAN, 2019 WL 5690478, at *2 (E.D. Tex. July 31, 2019), *report and recommendation adopted,* No. 4:18-CV-814, 2019 WL 4564837 (E.D. Tex. Sept. 20, 2019)(construing the Texas statute).

The Court should reject Appellant's Constitutional arguments and should affirm the District Court's *Order Determining Plaintiff a Vexatious Litigant*. [CR 266-268].

PRAYER

For the foregoing reasons, this Court should affirm the District Court's *Order Determining Plaintiff a Vexatious Litigant*. [CR 266-268].

Signed on this the 17th day of December 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Tex. R. App. P. 9.4(i)(3), this is to certify that the Amicus Brief of Scott M. Tschirhart contains 4,184 words. This does not include the caption, signature, proof of service, certificate of compliance as per Tex. R. App. P. 9.4(i)(1)

/s/SCOTT M. TSCHIRHART
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon the below named individuals as indicated, and according to the Texas Rules of Appellant Procedure and/or via electronic notification and/or email on this the 17th day of December 2019:

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